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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE RESPONDENT

JOHN W. NOBLE, JR.
PAUL B. SCHECHTER
CHERYL BLACKWELL BRYSON
KATTEN, MUCHIN, ZAVIS, PEARL & GALLER
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-7400
Attorneys for the Chamber of Commerce of the United States, *Amicus Curiae*

Of Counsel:
STEPHEN A. BOKAT
National Chamber
Litigation Center
1615 H Street, N.W.
Washington, D.C. 20006
(202) 463-5337

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BRIEF *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the "Chamber") is the largest federation of business organizations and individuals in the United States. Presently, the Chamber's membership consists of 245,000 corporations, partnerships, proprietorships and individuals, as well as 1,350 trade associations, and 2,700 local and state Chambers of Commerce.

One of the principle functions of the Chamber is to serve as spokesperson for its members. In this capacity, the Chamber

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 36.

has regularly represented the interests of its members before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the Federal Government. In this regard, the Chamber has participated as *amicus curiae* in numerous cases before this Court.[2]

The issue presented here is whether the court below correctly concluded that the National Labor Relations Board (the "Board") erred in finding that the employer's discharge of an employee violated Section 8(a)(3) of the National Labor Relations Act (the "Act"), in view of the Board's requirement that, to avoid such a result the employer must overcome the General Counsel's *prima facie* case of unlawful motivation by establishing by a preponderance of the evidence that the employee would have been discharged even absent his protected activities. This issue is of vital concern to the Chamber and its members. Unless the First Circuit's decision is affirmed, employers' rights to discipline employees for reasons unrelated to protected conduct, rights protected by the Act and recognized by this Court,[3] will be substantially impaired. Necessarily, this Court's decision in this case will have a significant impact on the manner in which many Chamber members do business. It is for these reasons that the Chamber respectfully submits its views.

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[2] *See e.g., Metropolitan Edison Co. v. People Against Nuclear Energy, cert. granted,* 51 U.S.L.W. 3339 (U.S. Nov. 2, 1982) (Nos. 81-2399, 82-358); *First National Maintenance Corp. v. NLRB,* 449 U.S. 1076 (1981); *Northwest Airlines v. Transport Workers of America, AFL-CIO,* 447 U.S. 920 (1980); *Rockwell International Corp. v. City of New York,* No. 81-904, 102 S.Ct. 1038 (Jan. 11, 1982); *Weyerhaeuser Co. v. Lyman Lamb Co.,* Nos. 81-1618, 81-1619, 102 S.Ct. 2232 (May 17, 1982) (order granting petition to file *amicus*).

[3] *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937).

STATUTORY PROVISIONS INVOLVED

Section 7 of the Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the Act, 29 U.S.C. 160(c), provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

Section 10(e) of the Act, 29 U.S.C. 160(e), provides in pertinent part:

> * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

Section 706(g) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. 2000e-5(g), provides, in pertinent part:

> * * * No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

SUMMARY OF THE ARGUMENT

The First Circuit, in remanding the case below for reconsideration under the standard of *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *enforcing, Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, correctly directed the Board to be governed by the evidentiary analysis set forth by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

In unfair labor practice cases which turn upon the nexus between an employee's discharge and an employer's motive, the Board has correctly decided to evaluate the employer's true motive by a "but for" causation standard. The procedural framework established by the Board for determining "but for" causation, however, is inept. It completely fails to measure true motive. It also allows the General Counsel to prevail without having sustained its burden of proof. These failings render the Board's *Wright Line*[4] test inconsistent with the Act and the policies it promotes. The *Burdine* test cures these defects. Accordingly, this Court should affirm the lower court's ruling that the Board must apply *Burdine* to allocate the burdens in cases arising under the Act.

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[4] Hereinafter the Board case will be referred to as *Wright Line* and the First Circuit decision will be referred to as *NLRB v. Wright Line*.

ARGUMENT

THE FIRST CIRCUIT IN *NLRB v. TRANSPORTATION MANAGEMENT CORP.*, 674 F.2d 130 (1st Cir. 1982) CORRECTLY RULED THAT THE BOARD ERRED IN FINDING THAT AN EMPLOYER VIOLATES SECTION 8(a)(3) OF THE ACT IF THE EMPLOYER CANNOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT IT WOULD HAVE DISCHARGED THE EMPLOYEE FOR LEGITIMATE REASONS. IN REMANDING THE CASE FOR RECONSIDERATION UNDER THE STANDARD OF *NLRB v. WRIGHT LINE*, 662 F.2d 899 (1st Cir. 1981), THE COURT BELOW CORRECTLY DIRECTED THE BOARD TO BE GOVERNED BY THE EVIDENTIARY ANALYSIS SET FORTH BY THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE*, 450 U.S. 248 (1981).

I. INTRODUCTION

The conflicting positions of the parties can be illustrated by the following question:

> Who shall prevail if, after presentation of all the evidence, the employer's action could have resulted equally from lawful or unlawful motivation?

Under the Respondent's theory, the employer would prevail, as the Board's General Counsel will have failed to sustain its burden of proof by a preponderance of the evidence. Under the Board's theory, it's General Counsel should prevail, as the employer will not have proven its absence of guilt by a preponderance of the evidence. The latter would be a result unique in American jurisprudence.

The Board's justification for its position, that the employer deserves such a burden because, after provoking a complaint, it best has access to proof of its innocence. This requires the respondent to prove its innocence rather than the General Counsel to prove respondent's guilt.

In these cases the discriminatory intent or "real motive" of an employer must be proven by the General Counsel.[5] On this point the parties are in agreement. The *amicus* submits that the analysis adopted by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) is the proper procedural framework for determining the requisite intent within the constraints of the Board's Section 10(c) obligations. This *Burdine* analysis requires a ruling against the General Counsel when the evidence is in equipoise. The Board's proffered test, on the other hand, not only fails to identify the true motive, but also fails to require the General Counsel to prove its case by a preponderance of the evidence. The test posited by the *amicus* and the Respondent, unlike that put forth by the Board, is mandated by the Board's statutory and regulatory obligations, controlling case law and traditional principles of proof.

II. THE PROCEDURAL COMPONENT OF THE BOARD'S *WRIGHT LINE* TEST IS INCONSISTENT WITH THE SUBSTANTIVE TEST OF CAUSATION ADOPTED BY THE BOARD IN THAT SAME CASE.

A. In *Wright Line* the Board set forth the components of its substantive and procedural tests.

The test formulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980) has substantive and procedural components. *See, Behring International, Inc. v. NLRB*, 675 F.2d 83, 87 (3d Cir. 1982); and *NLRB v. Wright Line*, 662 F.2d 899, 903 (1st Cir. 1981).

> • • • *Substantively*, it analyzes the connection between an employee's discharge and an employer's antiunion animus in terms of "but for" causation. To find a §8(a)(3) violation, the Board must determine that the employee

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[5] *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961).

> would not have been discharged but for his protected union activity. No violation exists if the employer would have made the same decision to discharge the employee in any event, absent the shielded conduct. (Emphasis added.)

Behring International, 675 F.2d at 87. Procedurally, the test analyzes the nexus between an employee's complained of treatment and an employer's motivation through the use of a burden shifting analysis. The Board

> first requires the General Counsel to make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line,* 251 N.L.R.B. at 1089. Once this is done, the burden shifts onto the employer to "demonstrate" that the same action would have taken place even in the absence of the protected conduct. *Id.* By "demonstrate," the Board means that the *burden of persuasion shifts to the employer, not merely the burden of going forward with evidence* to rebut the *prima facie* case.

Behring International, 675 F.2d at 88. (Emphasis added.)

B. *Wright Line's* substantive component, "but for" causation, is the correct measure of the nexus between an employee's discharge and an employer's motive.

In *Wright Line,* the Board acknowledged that in cases arising under Sections 8(a)(1) and 8(a)(3), an area fundamental to the Act, the decisions by the circuit courts and the Board reflected the disagreement and controversy over the correct measure of the nexus between an employee's discharge and an employer's motive. In an effort to put an end to the inconsistencies within its own decisions and to address the concerns of the various courts of appeals, the Board announced that "in all cases alleging a violation of Section 8(a)(3) or Section 8(a)(1) turning on employer motivation," it would apply to this area the test adopted by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle,* 429

U.S. 274 (1977). In discussing the applicability of *Mt. Healthy*, the Board noted the substantive similarity between the *Mt. Healthy* test and the "dominant motive" or "but for" test, and distinguished between them solely with regard to the process with which the burden of proof is to be allocated. The Board explained that, under the *Mt. Healthy test:*

> . . . after an employee or, here, the General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

Wright Line, 251 N.L.R.B. at 1087.

Uniform adherence to the "but for" causation test is a welcome development which should eradicate the confusion that has prevailed in this area of labor law.[6] Significantly, that test satisfies the Supreme Court's requirement that the Board ascertain the true reason for an employer's actions. This requirement is based upon this Court's reasoning that "[t]he Act does not interfere with the normal exercise of the right of an employer to select its employees or to discharge them. . .and. . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for reasons other than. . . intimidation and coercion." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

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[6] The courts and the Board, when confronted with so-called mixed motive cases have applied several different tests to determine whether the Act has been violated. Those tests have been characterized as "pretext", "dual motive", "in part" and "dominant motive" tests. *Wright Line*, 251 NLRB at 1083-85.

C. The procedural component of *Wright Line* fails to measure "but for" causation.

The procedural test posited by the Board, fails to measure "but for" causation and instead encourages return to pre-*Wright Line* confusion over arriving at motivation. That test provides that:

> [F]irst, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, 251 N.L.R.B. at 1089.

Applying principles from *Mt. Healthy*, the Board has concluded that an employer violates Section 8(a)(3) if its hostility to an employee's protected activities is shown, by a preponderance of the evidence, *to be a motivating factor* in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate business reasons, absent his protected activities.

The flaws in the Board's analysis are readily apparent, for while the Board acknowledges the established concept that the General Counsel retains the ultimate burden to establish an unfair labor practice by a preponderance of the evidence (Board Brief at 29), this is impossible to reconcile with the practical results of the Board's test. Under that test, there is no doubt that when the evidence is in equipoise, the General Counsel prevails without any determination having been made as to the employer's true motive. As such, this framework does not measure "but for" causation and conflicts with the Board's obligation under Section 10(c) of the Act.

Having determined the impropriety of the Board's procedural analysis, the *amicus* now examines the analysis

proposed by the First Circuit following this Court's decision in *Burdine*.

III. The *Burdine* analysis rather than the Board's *Wright Line* framework measures discriminatory intent in terms of "but for" causation.

Since the Board correctly decided to measure discriminatory intent by "but for" causation, this Court should require that the procedural test utilized accomplish that purpose. The *Burdine* analysis should be the working guideline for the Board. That test was adopted by this Court to resolve the conflicts amongst the circuit courts[7] over the proper procedural framework to measure discriminatory intent in cases arising under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). It represents the culmination of this Court's considered thinking as to the proper means to measure motive, a concern as central to Title VII cases as it is to Section 8(a)(3) cases.[8] Moreover, this test measures motive in a manner that properly answers the very question before this Court of which party prevails when the evidence is in equipoise.

In *Burdine*, this Court readdressed[9] the issue of the burdens on each party in a Title VII case[10] involving a single

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[7] Cases evidencing the conflict at that time were *Kirby v. Colony Furniture Co.*, 613 F.2d 696 (8th Cir. 1980); *Ambush v. Montgomery County Government*, 620 F.2d 1048 (4th Cir. 1980); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980); and *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

[8] This Court developed its thinking on the question of discriminatory intent in cases such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Watersus*, 438 U.S. 567 (1978); and *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

[9] *See* cases cited *supra* note 8.

[10] *Burdine* involved a claim of sex discrimination in employment. The female plaintiff applied for a supervisory job in a division of the employer which remained vacant for six months after she applied.

(footnote continued on following page)

individual's claim of unlawful discrimination. In such cases, this Court has made it clear that a finding of specific intent to discriminate is required.[11] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court stated that in Title VII cases the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 890-91. at 1093. This Court recognized that intermediate burdens do shift back and forth between the parties. The first intermediate burden is on the plaintiff to establish by admissible evidence a *prima facie* case of discrimination. Once accomplished, the burden shifts to the respondent to produce evidence that its action was taken against the plaintiff for legitimate nondiscriminatory reasons. On this point, this Court made it clear that the burden placed upon the respondent was a burden to produce evidence, not a burden to persuade the Court that it was actually motivated by the proffered reasons. In clarifying this burden the Court explained that

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(footnote continued from previous page)
Subsequently, when the employer reduced its staff, the plaintiff was terminated. For its defense, the employer contended that the division's future funding from the United States Department of Labor was jeopardized because of its inefficiencies. In an effort to improve, the division and the employer agreed to fill the supervisory position and completely reorganize the division's staff. The supervisory position was filled as a result of consultation among the employer's trusted advisors and a nondiscriminatory evaluation of the applicants. The persons terminated did not work well together, and the employer thought eliminating this inefficiency would improve the division's efficiency.

[11] This is to be contrasted with so-called "discriminatory impact" cases in which this Court has held that discriminatory intent is not an essential element to be proven. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Only when the finder of fact is confronted with cases involving facially neutral practices that adversely affect the protected rights of a group of employees is a finding of intent unnecessary under either Title VII or the Act. *See Griggs* and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

> * * * It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Burdine, 450 U.S. at 890-91.

Once the employer satisfies its burden to neutralize the *prima facie* case, the plaintiff, having retained the burden of persuasion, must have the opportunity to demonstrate that the reasons proffered by the employer were pretextual. This burden merges with the ultimate burden of persuading the court that plaintiff was victimized by unlawful discrimination. The plaintiff

> * * * may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas, supra*, at 804-805, 93 S.Ct., at 1825-1826.

Id.

The *Burdine* analysis is well suited to achieve the Board's statutory mandate. First, it is a burden allocation test for assessing true motive, developed specifically for an area of the law which requires examination of respondent's dual motives or the assertion of pretextual reasons for an action. Second, it is a

test which rests the ultimate burden of persuasion upon the plaintiff. Third, when the evidence is inconclusive, the party with the ultimate burden of persuasion loses. These factors, together, insure that "but for" causation will be measured and done so in accordance with the parties' respective proof burdens.

IV. THE *BURDINE* ANALYSIS IS CONSISTENT WITH THE LANGUAGE AND POLICIES OF THE NATIONAL LABOR RELATIONS ACT.

A. As the *Burdine* analysis promotes employment policies identical to those protected by Sections 8(a)(1) and 8(a)(3) of the Act, its measure of intent should be applied to such cases.

Title VII promotes employment policies identical to those protected by the Act and is consistent with the Board's obligations under Section 10(c). Accordingly, the First Circuit in the case below correctly directed the Board to consider the employer's burden in light of *Burdine*.

The Act provided the basic statutory scheme followed by Congress in enacting Title VII.[12] The Act makes it an unfair labor practice to discriminate against employees who exercise their rights concerning union or protected activity. Similarly, Title VII prohibits discrimination in employment based upon race, sex, religion and national origin. The parallel language of Section 10(c) of the Act and Section 706(g) of Title VII indicates that neither statute was intended to "diminish traditional management prerogatives" or the employer's legitimate interest in an efficient and productive work force. *See Steelworkers v. Weber*, 443 U.S. 193, 205-06 (1979) and *NLRB v. Truck Drivers Local*, 353 U.S. 87 (1957). Similarly, neither

[12] *See Lorillard v. Pons*, 434 U.S. 575, 578 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. U.S. 405, 419 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974).

statute demands that an employer give preferential treatment to persons protected thereby. An employee in a protected class under either statute should not be in a better position than he would have held if he were not so protected. A contrary result necessarily would impair the employer's freedom to apply legitimate performance standards and would place the protected person in a preferred class. *See Burdine,* 450 U.S. at 893-96 and *Wright Line,* 251 N.L.R.B. at 1086.

Since the language of, and the policies promoted by, these provisions are substantially similar, and because there appears to be no justification for placing a greater evidentiary burden on an employer accused of discrimination under the Act than upon one accused of Title VII discrimination, this Court should extend the *Burdine* burden allocation test to cases arising under the Act. This would standardize the burdens in both these employment discrimination cases and, in so doing, would lend certainty to a confused area of employment law, and impart a sense of predictability to the expectations of parties contemplating or engaged in litigation.

B. The Board's obligation under Section 10(c) to prove an unfair labor practice by a preponderance of the evidence requires it to allocate burdens in accordance with *Burdine*, and the Board's allocation in accordance with *Mt. Healthy* is in excess of the Board's authority.

In relying upon *Mt. Healthy* and in requiring respondent to overcome the General Counsel's *prima facie* case by establishing by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent the employee's union activities, the Board exceeded its authority under the Act and its own regulations. The First Circuit's direction to the Board to reconsider the burden upon the employer under *Burdine* seeks to cure these defects in the Board's approach.

Examination of the relevant statutes compels the conclusion that the *Burdine* burden allocation test should govern the Board's approach. Section 10(c) of the Act provides that the Board must dismiss a complaint when "upon the preponderance of the testimony taken" the Board "shall not be of the opinion" that an unfair labor practice was committed. Regulation 101.10(b) of the Board's Regulations, 29 C.F.R. §101.10(b) (1980), state that "[t]he Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act." Additionally, Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556, states that "[e]xcept as otherwise provided by statute, the proponent of an order has the burden of proof." In the face of these clear provisions, the Board cannot in good faith contend that the overall burden of proving a violation does not rest with it. More precisely, these provisions make it irrefutably clear that when the evidence is at equipoise, the General Counsel has not carried its burden and a violation of the Act should not be sustained.

In an effort to avoid its clear statutory mandate, the Board urges this Court to look beyond the face of Section 10(c) to that provision's legislative history. Although the statute is clear on its face and such an exercise is unwarranted, *United States v. American Trucking Association, Inc.*, 310 U.S. 534, *reh'g denied*, 311 U.S. 724 (1939), even a resort to the legislative underpinnings requires the same result.

In order to understand Congress' intent in enacting the disputed portion of Section 10(c), this Court must examine three provisions Act enacted by Congress in 1947 to amend the Wagner Act. The legislative history to the disputed provision of Section 10(c), viewed independently, is inconclusive on the question of burden of proof.[13]

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[13] *See NLRB v. Wright Line*, 662 F.2d at 904 n.8.

Congress first amended Section 10(c) to require specifically that discharges for cause be beyond the remedial authority of the Board.[14] In explicitly recognizing management rights, Congress strove to eliminate the Board's practice of inferring that ". . . because [an employee] was a member or an official of a union, this, not his misconduct was the reason for his discharge."[15] The amendment to Section 10(c) which required the Board to base unfair labor practices on a "preponderance of the evidence" standard rather than the virtually unreviewable "all the testimony" standard of the Wagner Act[16] was the second limitation on the Board's resolution of Section 8(a)(3) cases. In essence, this amendment requires the Board to identify the specific evidence relied upon instead of simply resting its discussion on all the evidence presented.[17] The enhanced preponderance of the evidence requirement was reinforced by the simultaneous amendment to Section 10(e) to substitute a more stringent "substantial evidence" review standard for existing "supported by evidence" standard.[18] Through this amendment Congress enhanced the courts' power of review to insure agency adherence to its heavier burden of proof.[19]

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[14] Labor Management Relations Act of 1947, sec. 101, § 10(c) (amending National Labor Relations Act § 10(c), 29 U.S.C. § 160(e) (1970).

[15] H.R. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 505, 559.

[16] Labor Management Relations Act of 1947, sec. 101, §10(e) (amending National Labor Relations Act §10(e), 29 U.S.C. §160(e) (1970).

[17] H.R. CONF. REP. No. 510 80th Cong., 1st Sess. 56 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 15, at 505, 560.

[18] Labor Management Relations Act of 1947, sec. 101, §10(e) (amending National Labor Relations Act §10(e), 29 U.S.C. §160(a) (1970).

[19] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 56 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 15, at 505, 560.

These provisions, taken together, strongly suggest that the drafters of the 1947 amendments intended to impose stiffer evidentiary tests to be used in discriminatory discharge cases. Thus, the Board's argument that Congress, through the 1947 amendments, left unfettered the Board's approach to these cases, thereby approving of it, is aptly refuted.

The Board's failure to acknowledge its statutory mandate caused it erroneously to look to *Mt. Healthy* to allocate burdens of proof. Since no statutory or regulatory provisions, such as those which limit the Board's authority, were present in *Mt. Healthy,* the Court was free to allocate the burden of proof. It did so in that case by applying unique burdens applicable in measuring state action under constitutional standards. The Board, operating under strict statutory mandate, has no power to shift *Mt. Healthy* burdens onto the employer.

Similarly, in cases arising under 42 U.S.C. 1981, the lower courts, observing traditional allocation of the burden of proof in enforcing a statute which does not identify the party upon whom the burden of proof is placed, have followed the *Burdine* approach. *See Banerjee v. Board of Trustees of Smith College,* 648 F.2d 61 (1st Cir. 1981), *cert. denied,* 102 S. Ct. 671 (1981); *Underwood v. Jefferson Memorial Hosp.,* 637 F.2d 455 (8th Cir. 1981); *Kenyatta v. Bookey Packing Co.,* 649 F.2d 552 (8th Cir. 1981); *Metrocare v. Wmata,* 25 Fair Empl. Prac. Cas. (BNA) 76 (D.D.C. 1981); *Harris v. Richards Manufacturing Co.,* 511 F.Supp. 1193 (W.D. Tenn. 1981); *Hobson v. Western Airlines,* 25 Fair Empl. Prac. Cas. (BNA) 1509 (N.D. Cal. 1980); *Metcalf v. Omaha Steel Castings Co.,* 507 F. Supp. 679 (D. Neb. 1981); *Wade v. New York Telephone Co.,* 500 F.Supp. 1170 (S.D.N.Y. 1980). Application of *Burdine* by these courts is a further testament to the inapplicability of *Mt. Healthy* to statutory cases. The Board's reliance upon *Mt. Healthy,* then, was misplaced and is inconsistent with the Board's statutory constraints.

V. THE BOARD MISCHARACTERIZES THE EMPLOYER'S RESPONSE AS AN AFFIRMATIVE DEFENSE AND, BASED ON THIS ERROR, TRANSFERS THE ULTIMATE BURDEN OF PROOF FROM THE GENERAL COUNSEL TO THE EMPLOYER.

This Court, in *Burdine*, explained in detail how discriminatory intent must be proven in cases alleging discriminatory treatment.[20] In so doing, this Court characterized the defendant's burden as an obligation to rebut the legally mandatory presumption which arises when the plaintiff establishes its *prima facie* case. This Court implicitly rejects the Board's contention that the defendant's obligation is to raise an "affirmative defense" to the General Counsel's *prima facie case*. An affirmative defense admits the allegations of the complaint to be true and raises a defense to them to negate any basis for a remedy. *See County of Washington v. Gunther*, 452 U.S. 161, 167-81 (1981); FED. R. CIV. 8(c); and *NLRB v. Wright Line*, 662 F.2d. at 906.

In the case below no affirmative defense was raised or required as there was no admission that unlawful conduct played any part in the decision under review.

Under the reasoning of *Burdine*, this Court implicitly recognized that the nature of the defense raised in a Title VII case is more akin to a direct defense—a denial as to unlawful conduct rather than to an affirmative defense, which involves an admission that the unlawful conduct occurred coupled with a description of the true motivation. *See NLRB v. Wright Line*, 662 F.2d at 906. This characterization is also true as to the nature of the defenses raised in Section 8(a)(3) cases. *Id.* at 906.

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[20] *See supra* note 11.

The Board's elaborate framework merely requires the General Counsel to produce evidence sufficient to support the inference that protected conduct was "a 'motivating factor' in the employer's decision." This evidence can do nothing more than raise a *prima facie* case, as no more is possible without consideration of all the evidence. The General Counsel at that point has established nothing more than a rebuttable presumption. Absent *conclusive proof* that protected activity was a motivating factor, or an admission of such, the employer's response necessarily cannot be characterized as an affirmative defense. As in Title VII cases, the employer's response in Section 8(a)(3) cases is generally a denial of unlawful conduct and a statement of the valid reasons therefore, i.e. a direct defense. The Board cannot avoid its statutory obligation by simply mischaracterizing the nature of the employer's response.

VI. CONCLUSION

Notwithstanding the Board's assertion that it has adopted the "but for" substantive standard, the Board's procedural analysis perpetuates the same confusion the Board purported to eliminate. Under the Board's *Wright Line* process, true motive is not shown. The General Counsel will prevail without having sustained the burden of proving that unlawful activity truly motivated the employer. Thus, the *Wright Line* test is inconsistent with the applicable provisions of the Act and the policies it promotes.

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

JOHN W. NOBLE, JR.
PAUL B. SCHECHTER
CHERYL BLACKWELL BRYSON
KATTEN, MUCHIN, ZAVIS, PEARL & GALLER
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-7400
Attorneys for the Chamber of Commerce of the United States, *Amicus Curiae*

Of Counsel:

STEPHEN A. BOKAT
National Chamber
Litigation Center
1615 H Street, N.W.
Washington, D.C. 20006
(202) 463-5337

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